

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
EDWARD R. ESTER d.b.a.
WARDS APARTMENTS,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 77-59

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a \$250 civil penalty for smoke emissions allegedly in violation of respondent's Section 9.03(b) of Regulation I, came on for hearing before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney, convened at Seattle, Washington on September 26, 1977. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing.

Appellant, Edward R. Ester, appeared by and through his attorney, Craig S. Sternberg. Respondent appeared by and through its attorney, Keith D. McGoffin. Court reporter Gene Barker recorded the proceedings.

1 Witnesses were sworn and testified. Exhibits were examined.
2 From testimony heard and exhibits examined, the Pollution Control
3 Hearings Board makes these

4 FINDINGS OF FACT

5 I

6 Respondent pursuant to RCW 43.21B.260, has filed with this
7 Hearings Board a certified copy of its Regulation I containing
8 respondent's regulations and amendments thereto. Official notice thereof
9 is hereby taken.

10 II

11 The appellant owns and operates the Ward Apartments in Seattle,
12 Washington.

13 III

14 On the morning of March 29, 1977 the furnace in the Ward
15 Apartments ceased to work. The apartment manager, following
16 procedure established by appellant, telephoned the appellant's son,
17 and, together, they inspected the furnace. The furnace fire had
18 gone out, and consequently a quantity of unburned fuel oil had
19 flowed into the combustion chamber. The appellant's son determined
20 to relight the burner but only after igniting the unburned fuel oil
21 by setting a wood and paper fire in the combustion chamber.

22 The appellant's son did not believe that an excessive emission
23 would be caused by igniting the unburned fuel oil. He was aware
24 that notice could be given to respondent, under Section 9.16 of Regulation
25 I, concerning excessive emissions resulting from unforeseeable equipment
26 failure, and that such emissions would then not be deemed a violation

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1 of respondent's regulations. Believing as he did, appellant's son did
2 not notify respondent of his plan to ignite the unburned fuel oil. Further
3 the appellant's son ignited the unburned fuel oil, knew of the black
4 smoke emission which resulted, and then neither notified respondent nor
5 did he send the apartment manager to do so.

6 IV

7 Upon igniting the unburned fuel oil the appellant's son caused
8 a black smoke emission of at least seven minutes duration, of a shade
9 equivalent to Nos. 3-5 on the Ringelmann Chart. This emission was
10 observed by respondent's inspector who immediately went to the Ward
11 Apartments, and informed appellant's son of the emission. A Notice of
12 Violation and Notice and Order of Civil Penalty No. 3264 in the amount
13 of \$250 were subsequently issued to appellant. From this penalty,
14 appellant appeals.

15 V

16 Any Conclusion of Law hereinafter recited which should be
17 deemed a Finding of Fact is hereby adopted as such.

18 From these Findings the Pollution Control Hearings Board
19 comes to these

20 CONCLUSIONS OF LAW

21 I

22 Section 9.03(b) of respondent's Regulation I states:

23 . . . After July 1, 1975, it shall be unlawful for
24 any person to cause or allow the emission of
25 any air contaminant for a period or periods
aggregating more than three (3) minutes in any
one hour, which is:

6 (1) Darker in shade than that designated as
27 No. 1 (20% density) on the Ringelmann Chart, as
published by the United States Bureau of Mines; or

1 (2) Of such opacity as to obscure an observer's
2 view to a degree equal to or greater than does
3 smoke described in Subsection 9.03(b)(1); provided
4 that, 9.03(b)(2) shall not apply to fuel burning
5 equipment utilizing wood residue when the particulate
6 emission from such equipment is not greater than
7 0.05 grain per standard cubic foot.
8

9 The appellant, through his son and servant, has violated
10 Section 9.03(b) of respondent's Regulation I.

11 II

12 In order to exculpate himself from this violation, appellant
13 asserts Section 9.16 of respondent's Regulation I which states as
14 follows:

15 Emissions exceeding any of the limits
16 established by this Regulation as a direct
17 result of start-ups, periodic shutdown, or
18 unavoidable and unforeseeable failure or breakdown,
19 or unavoidable and unforeseeable upset or breakdown
20 of process equipment or control apparatus, shall
21 not be deemed in violation provided the following
22 requirements are met:

23 (1) The owner or operator of such process or
24 equipment shall immediately notify the Agency of
25 such occurrence, together with the pertinent facts
26 relating thereto regarding nature of problem as
27 well as time, date, duration and anticipated
influence on emissions from the source.

(2) The owner or operator shall, upon the request
of the Control Officer, submit a full report
including the known causes and the preventive
measures to be taken to minimize or eliminate a re-
occurrence.

Although this section requires notice to respondent as its
central feature, appellant argues that the burning fuel oil created
exigent circumstances which kept appellant's son from leaving
the scene to notify respondent and thus excused the requirement of

1 notice to respondent. Before this exigency passed, of course,
2 respondent's inspector had recorded a violation and had notified
3 appellant of the violation.

4 Appellant's argument of exigent circumstances fails on
5 two grounds. First appellant had ample time after the breakdown of
6 the furnace to notify respondent before deliberately igniting the unburned
7 fuel oil. Secondly the presence of both the appellant's son and
8 the apartment manager on the scene left ample opportunity for one to
9 guard the fire while the other notified respondent. There being
10 no circumstances excusing appellant from notifying respondent, and there
11 being no notice, in fact, until respondent's inspector had recorded
12 the violation, Section 9.16 is not available to exculpate appellant
13 from this violation.

14 III

15 Appellant asserts that respondent's inspector entered the
16 premises of appellant's apartment without a search warrant, and
17 therefore this violation should be set aside. No such result is
18 required.

19 Although appellant did not move to exclude those things learned
20 and seen by respondent's inspector inside the apartment they may or may not
21 be constitutionally inadmissible. Without determining that, we conclude
22 only that respondent's view of the emissions from a public place
23 together with the testimony of appellant's son regarding events
24 inside the apartment are sufficient to sustain the violation, and
25 neither is tainted by any unconstitutional search.

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IV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted by such.

From these Conclusions the Pollution Control Hearings Board makes this

ORDER

The \$250 civil penalty appealed from, and imposed by Notice and Order of Civil Penalty No. 3264, is hereby affirmed.

DONE at Lacey, Washington this 18th day of October, 1977.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Member

Dave J. Mooney
DAVE J. MOONEY, Member

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